

STATE OF DELAWARE JUSTICE OF THE PEACE COURTS

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LEGAL MEMORANDUM 96 -212

TO:

ALL JUSTICES OF THE PEACE

FROM:

PATRICIA W. GRIFFIN

CHIEF MAGISTRATE

DATE:

MARCH 11, 1996

RE:

AUTHORITY TO CONDUCT INITIAL APPEARANCE ON A

FEDERAL CRIMINAL CHARGE

ISSUE

Do Justices of the Peace have authority to conduct initial appearances of persons charged with a federal crime?

SHORT ANSWER

YES.*

DISCUSSION

Under federal law, when a federal magistrate judge is not reasonably

^{*}I would like to thank Judge Anderson for his work and research on this topic.

available, an officer arresting a person on a federal criminal charge may bring the person before a Justice of the Peace (or other state judicial officer) for purposes of conducting an initial appearance. See 18 U.S.C. § 3041 and Rule 5 of the Federal Rules of Criminal Procedure. The purpose of the proceeding before the Justice of the Peace is to determine, "pursuant to the provisions of section 3142 of [title 18 of the United States Code], whether to detain or conditionally release the prisoner prior to trial or to discharge him from arrest." 18 U.S.C. § 3041.

The notes of the Advisory Committee on the Federal Rules of Criminal Procedure state that, when a person is brought before a state judicial officer, the officer "shall inform the person of the rights specified in [federal criminal] rule 5(c) and shall authorize the release of the arrested person under the terms provided by the rules and by 18 U.S.C. [§ 3142]." After conducting the initial appearance, the Justice of the Peace shall immediately transmit any written order of release and any papers filed before him or her to the appropriate United States magistrate judge and order the person to appear before the magistrate judge within three (3) days if the person is not detained in custody or the next business day of the court if the person is detained.

In conducting the initial appearance, the Justice of the Peace shall, in conformance with Rule 5(c) of the Federal Rules of Criminal Procedure, inform the defendant as follows:

- of the complaint against the defendant and of any affidavit filed with the complaint;
- of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel;
- of the circumstances under which the defendant may secure pretrial release [or the conditions of bond -- the applicable conditions are discussed below];
- that the defendant is not required to make a statement and that any statement made by the defendant may be used against him or her; and
- that the defendant has a right to a preliminary examination in the district court.

In determining whether to detain or conditionally release the person, the judicial officer looks to 18 U.S.C. § 3142 for guidance. Section 3142 provides that a judicial officer may release a person charged with an offense, pending trial, on personal recognizance, or upon execution of an unsecured appearance bond, and on certain conditions. Those conditions include any of the following: (a) that the person not commit a federal, state or local crime during release; (b) that the person remain in the custody of a designated person who agrees to supervise him or her and report violations of release conditions to the court; (c) that the person maintain employment or, if unemployed, actively seek employment; (d) that the person maintain or commence an educational program; (e) that the person abide by specified restrictions on personal associations, place of abode, or travel; (f) that the person avoid all contact with an alleged victim of the crime and with potential witnesses who may testify concerning the offense; (g) that the person report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency; (h) that the person comply with a specified curfew; (i) that the person refrain from possessing a firearm, destructive device or other dangerous weapon; (i) that the person refrain from excessive use of alcohol or any use of a narcotic drug or other controlled substance; (k) that the person undergo medical or psychiatric treatment; (1) that the person execute an agreement to forfeit money or other designated property upon failing to appear at court as required and post security with the court as required; (m) that the person execute a bail bond with surety as reasonably necessary to secure appearance; (n) that the person return to custody for specified hours following release for work, school, etc.; or (o) that the person satisfy any other reasonable condition. Please note that the judicial officer "may not impose a financial condition that results in the pretrial detention of the person."²

¹As you know, Article I, § 12 of the Delaware Constitution of 1897 and 11 *Del. C.* § 2104 require that Justices of the Peace set bail for all persons charged with a crime, except those charged with a capital offense. However, since our authority to conduct initial appearances for federal offenders stems from 18 U.S.C. § 3041, provisions contained in that section control, if there is a conflict with state law provisions. As a consequence, Justices of the Peace have the authority to detain a person without bail only on federal charges pursuant to § 3041.

²The federal scheme for setting bail is quite different from Delaware's process. The U.S. Magistrate for Delaware advised that in many cases (including a crime of violence, a drug offense with a possible statutory penalty of 10 years or more, offense involving an illegal alien or a person already on post-trial or pre-trial release), there is either a rebuttable presumption <u>against</u> release or the defendant must show by clear and convincing evidence that they should be released.

[Since the decision of the Justice of the Peace to either detain or release will be reviewed by a United States magistrate judge in a short period of time, our focus should be on conditions which pertain directly to the safety of the alleged victim or the community and which assure the person's appearance in court -- most likely, conditions (a), (b), (e), (f), (h), (i), (l) and (m) noted above. With regard to setting bail, I would utilize the Justice of the Peace Court bail guideline recommendations and consider, as a starting point, the level of state charge most similar in nature and seriousness to the federal charge at issue as a starting point. Standard Justice of the Peace Court bond and commitment forms should be used with regard to these charges and standard procedures for forwarding bail money to other courts should be followed.]

Another option under § 3142 is for the judge to temporarily detain the person to permit deportation or because, at the time the offense was committed the person was on release pending trial for a state or federal felony charge, on release post-trial prior to sentence, or on probation or parole for a federal or state offense, or is not a citizen of the United States or a permanent resident of the United States, and the person is a flight risk or poses a danger to another person or the community.

Another alternative is to detain the person if no condition of bond will reasonably assure the appearance of the person and the safety of any other person and the community.

If detention is not sought at the person's first appearance before a judicial officer, the defendant cannot later be detained. *Cf. U.S. v. Holloway*, 8th Cir., 781 F.2d 124 (1986); *U.S. v. O'Shaughnessy*, 5th Cir., 764 F.2d 1035 (1985), *rhg. dism.*, 772 F.2d 112 (1985). Thus, I expect that you will receive a request to detain the defendant in many cases; those requests should be noted on the bail and disposition form.

In addition, under § 3142(f) of Title 18, U.S.C., federal prosecutors or agents may request a continuance of the initial appearance proceeding for up to 3 days and, during that period, the defendant is automatically detained.³ Thus, there will be

³§ 3142(f)(2) provides that "the [detention] hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person

many cases in which a continuance is requested and you will not set bail. The defendant should still be advised of the charges against him or her and his or her rights. Usually, those detention hearings are scheduled for the next day the federal court is open.

I hope this information is helpful should the circumstance arise when you are called upon to conduct an initial appearance on a federal charge.

PWG/crm

cc: Honorable E. Norman Veasey

Honorable Randy J. Holland

Honorable Henry dupont Ridgely

Honorable Arthur F. DiSabatino

Honorable Vincent J. Poppiti

Honorable Alfred R. Fraczkowski

Honorable Gregory M. Sleet

Honorable Alicia Howard

Honorable Carolyn T. Greene

Honorable Mary Pat Trostle

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may not exceed five days, and a continuance on motion of the attorney for the government may not exceed three days. During a continuance, the person shall be detained on motion of the attorney for the government or *sua sponte*, [and the officer] may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict."